February 17 1875 Field

SUPREME COURT OF THE UNITED STATES.

No. 5.—ORIGINAL.

EX-PARTE: IN THE MATTER OF CHARLES SAWYER, JOHN B. BROWN, P. BROWN, JOHN BROWN, HENRY FOX, H. H. FURBUSH, AND WILLIAM RANDALL, PETITIONERS.

PETITION FOR MANDAMUS.

Oct 9 1874



To the honorable the justices of the Supreme Court of the United States:

Respectfully represent, Charles Sawyer, John B. Brown, Philip Brown, John Brown, Henry Fox, Henry H. Furbush and William Randall, that on the 15th day of April, 1869, they were the libellants in a cause in admiralty then pending in the circuit court of the United States for the southern district of New York against Samuel Oakman and Benjamin W. Eldridge, and that on said day, in pursuance of the 133d rule of said court, they filed their stipulation in said court; that thereupon, to wit, on February 16, 1870, an order was passed that the decree already made in the cause, which decree was in favor of your petitioners, should be carried into effect, unless the said Oakman and Eldridge appellants, should within twenty days from the 16th day of February, 1870,
2 give security by the stipulations of himself and of two competent sureties for judgment of all damages and costs on the appeal in said court and in the Supreme Court of the United States, in the full and just sum of $10,000.

That, in pursuance of said order, the following instrument was, on the 5th day of March, 1870, filed by the appellants in said circuit court:

"CHARLES SAWYER ET AL., LIBELLANTS AND appellees,
"*against*
"SAMUEL OAKMAN ET AL., RESPONDENTS AND appellants.

"Whereas a decree having been entered in the above-entitled cause, in the district court of the United States for the district of Massachusetts, for the libellants and appellees, and said cause having been appealed to the circuit court of the United States for the first circuit, and said cause having been certified to this court, by reason of the legal incompetency of the presiding justice of said circuit, and said appeal having been brought on for hearing in this court, it was ordered, on motion
3 of counsel for the appellees, that said appellants stipulate with sufficient sureties in the sum of ten thousand dollars, for costs and damages that may be awarded against them.

"Now, on the fourth day of March, in the year eighteen hundred and seventy, before me, Charles Demond, a commissioner duly appointed and empowered to take acknowledgements of bail, affidavits, etc., within the district of Massachusetts, appeared personally Samuel Oakman, of Somerville, in the State of Massachusetts, and, on behalf of himself and the interests represented by Benjamin W. Eldridge, now deceased, *and* produces for sureties James Lee, jr., and J. Wade Davis, of Charlestown, in the Commonwealth of Massachusetts, and the said Samuel Oakman, James Lee, jr., and J. Wade Davis, submitting themselves to the jurisdiction of the court above mentioned, bound them-
4 selves, their heirs, executors, and administrators, in the sum of ten thousand dollars, unto Charles Sawyer, John B. Brown, Philip Brown, John Brown, Henry Fox, Henry H. Furbush, and William Randall, all of Portland, in the State of Maine, that the said Samuel Oakman shall pay all damages, costs, and expenses which shall be awarded against him in this suit, upon the final adjudication thereof, or by any interlocutory order in the progress thereof; and unless he shall do so they do hereby consent that execution shall issue forth against them, their heirs, executors, and administrators, goods and chattels, wheresoever the same

shall be found, to the value of the sum above mentioned; and I am satisfied that the said Davis and Lee are each worth more than ten thousand dollars.

(Signed) "CHARLES DEMOND,
"*Commissioner of the U. S. Court*
"*for the District of Massachusetts.*"

(Endorsed:) "Stipulation. Filed March 5, '70."

5 That thereupon said circuit court proceeded to consider the case on the merits, and on June 11, 1870, the court rendered its decision in favor of your petitioners, and affirmed the decree of said district court; and on November 20, 1870, said circuit court entered its final decree in said cause in favor of your petitioners for the sum of $7,970.05; and said decree further ordered, adjudged, and decreed that unless an appeal be taken from this decree within the time prescribed by law, a summary judgment therefor be entered in favor of the said libellants, appellees, and against James Lee, jr., and J. Wade Davis, (sureties on said appeal, in the sum of ten thousand dollars, the amount of their stipulations by them given on said appeal,) and that said appellees have execution therefor to satisfy this decree.

(Signed) L. B. WOODRUFF,
Circuit Judge.

6 That on October 18, 1870, the following appeal was filed in said court:

"CHARLES SAWYER, LIB'L'NT & APPELLEE,
"*v.*
"SAMUEL OAKMAN ET AL., RESPONDENTS AND appellants.

"The above-named respondents, conceiving themselves aggrieved by the decision entered in this court on the eleventh day of June, A. D. 1870, affirming the final decree entered in the United States district court for the district of Massachusetts, do hereby appeal therefrom to the Supreme Court of the United States, and they pray that this their appeal may be allowed, and that a transcript of the record, proceedings, and evidence in the cause, duly authenticated, may be sent to the Supreme Court."

That on November 11 said appellants filed an appeal-bond, and a citation was issued, and on December 12, 1870, the transcript of the record was filed in this court.

7 That at the December term, 1871, while said cause was pending in this court, your petitioners filed a motion in this court suggesting the death of said Benjamin W. Eldridge, before final judgment, and prayed that said cause might proceed against Samuel Oakman, the surviving appellant therein; that on the 12th day of January, 1872, it was ordered that said cause abate as to said Eldridge, deceased, and said cause thereupon proceeded against said Oakman alone; that said cause was reached in its order in the month of October, 1872, and the judgment of the said circuit court was affirmed with interest and costs against said Oakman; that by a clerical mistake the mandate issued on said judgment stated that said judgment had been entered against both said Oakman and said Eldridge; that said mandate was sent to said circuit court, and said court entered judgment thereon against both

said Oakman and said Eldridge and against said stipulators, James Lee, jr., and J. Wade Davis; that execution issued on said judgment February 27, 1873, and on March 3, 1873, said Lee, jr., was arrested on said execution; that said Lee, jr., thereupon applied to the honorable L. B. Woodruff, judge of the circuit court of the United States for the southern district of New York, praying that the judgment against him be set aside and the execution withdrawn; that this petition was granted and a decree to this effect was filed in said circuit court April 12, 1873.

That your petitioners thereupon filed a motion in this court at the December term, 1872, to wit, on October 24, 1873, praying that the mandate already issued should be returned, and that a new mandate should issue in accordance with the judgment of this court, and this motion was granted. That thereupon, on the day of A. D. 1873, said new mandate issued to said circuit court of the United States for the southern district of New York, which, after reciting said decree of said circuit court, dated November 20, 1870, and the subsequent proceedings in this court, ordered that said decree be affirmed with costs and interest until paid, except as against said Eldridge, and said mandate commanded that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

That said mandate was duly filed in said circuit court, and your petitioners prayed that a decree should be entered, charging the said Samuel Oakman, and the said James Lee, jr., and J. Wade Davis as sureties on said stipulation, and that an execution issue accordingly against them; that the honorable Lewis B. Woodruff, judge of said circuit court, refused to allow said motion, but stated that an order should issue to said sureties to show cause why judgment should not be entered and execution issue against said sureties, as well as against said Oakman; that said order to show cause issued, and thereupon said judge ordered that judgment should not be entered against said sureties but only against said Oakman, and said order was made on May 8, 1874.

And your petitioners aver that said judge had no right to pass upon the question of the liability of said sureties, at that stage of the proceedings; that said decree of November 20, 187[4], recognized said sureties as parties to the proceedings, and that as said decree was affirmed by this court, except as to said Eldridge, the sole duty of said judge was a ministerial duty to cause an affirmance of the judgment formerly ordered to be made except as to said Eldridge, and to issue execution against said Oakman, and said Lee, jr., and said Davis.

Wherefore your petitioners pray that your honor would be pleased to order that a writ of mandamus, in due form, be at once issued from this court, returnable to such day as to your honors shall seem meet, commanding and requiring the honorable Lewis B. Woodruff, judge of said circuit court of the United States for the second circuit, to cause judgment to be entered against said James Lee, jr., and said J. Wade Davis, as well as against said Oakman; or on failure thereof, to show cause to this court on the said return-day why the same has not been done.

By their attorney,

JOHN LATHROP.

JOHN LATHROP,
Counsel for Petitioners.

12 (Endorsed:) Sup. Court U. S., 1874. Octo. term. No. 5.—Original. Ex-parte: In the matter of Charles Sawyer, John B. Brown, Phillip Brown, John Brown, Henry Fox, H. H. Furbush, & William Randall, petitioners. Petition and motion for mandamus on Hon. L. B. Woodruff, circuit judge 2d circuit. Filed 20 November, 1874.

13 Supreme Court of the United States, October term, 1874.

EX PARTE: IN THE MATTER OF CHARLES SAWYER, J. B. BROWN et al., petitioners. } No. 5. Original.

On consideration of the motion and petition for a writ of mandamus, filed in this cause by Mr. C. H. Hill, in behalf of Mr. John Lathrop, of counsel for the petitioners, it is now here ordered by the court that the Hon. Lewis B. Woodruff, judge of the circuit court of the United States for the southern district of New York, show cause on the 18th day of December, 1874, why a writ of mandamus should not issue to him commanding him to cause judgment to be entered against James Lee, jr., and J. Wade Davis, as well as against Samuel Oakman, in a cause pending in said circuit court, entitled Charles Sawyer et al. vs. Samuel Oakman.

30th November, 1874.

14 Circuit court of the United States for the southern district of New York.

CHARLES SAWYER ET AL.
agst.
SAMUEL OAKMAN ET AL.

Return to the rule of the Supreme Court of the United States issued to the judge of the circuit court of the United States for the southern district of New York, to show cause why a peremptory writ of mandamus should not issue commanding him to enter a certain judgment in the above cause, as prayed for in the said libellant's petition herein filed.

To the Supreme Court of the United States:

In return to the above rule received by me through the mail, it is respectfully stated, that the matters and things set forth in the petition of the said Sawyer et al. are substantially correct, and, save as the same are qualified by the statements hereinafter made, they are hereby affirmed.

15 In addition to the above matters I further return:

First. That by a rule of this court, number 133, in full force & operation before & during the time of the proceedings named in said petition, it is provided as follows: "The appellee may move this court to have the decree made in the district court carried into effect, subject to the judgment of this court or of the Supreme Court on appeal, upon giving his own stipulation to abide and perform the decree of such court, and this court will make such order unless the appellant shall give security by the stipulation of himself and competent sureties for payment of all damages and costs on the appeal in this court and in the Supreme Court in such sums as this court shall direct."

Second. That by a rule of this court, also in full operation before & during the pendency of said proceedings, it is provided:

"All stipulations in causes civil and maritime shall be executed by the principal party (if within the district) and at least one surety resident therein. * * * * * * * * Non-resident parties must
16 supply at least two sureties."

Third. That after the order mentioned in the petition directing that the decree of the district court of Massachusetts should be carried into effect, unless the appellants gave security by stipulation, the paper quoted in said petition as bearing date the 4th day of March, 1870, was placed on the files of this court ex parte; that the attention of said court or of any judge thereof was not called to the same, nor was the same ever approved, passed upon, or considered by this court, until the motion was made to set aside the decree as mentioned in said petition.

Fourth. That on the receipt of the mandate of the Supreme Court first-named in said petition, a decree was made ex parte in the usual form of such decree as to stipulators, without production of or reference to said paper dated March 4, 1870, and without notice to the said alleged stipulators.

Fifth. That on motion to set aside the execution issued upon
17 the decree of this court as stated in said petition, the parties were heard by their counsel, and the execution was set aside for reasons stated in the opinion then filed in the words following:

Circuit court of the United States for the southern district of New York.

CHARLES SAWYER ET AL., LIBELLANTS & APPELLEES,
vs.
SAMUEL OAKMAN & OTHERS, APPELLANTS.

WOODRUFF, *Circuit J.:*

A motion has been made herein on the petition of James Lee, jun'r, an alleged stipulator on the appeal from the district court for the district of Massachusetts to the circuit court, which was transferred to this court under and by virtue of sec. 8 of the act of Congress of Feb'y 28, 1839. (5 U. S. Stat. at Large, 322)

After the transfer of the cause to this court, and on the 16 Feb'y, 1870, an order was made (under and in conformity with the 133
18 rule of this court) that the decree of the district court be carried into effect unless the appellants should give security by the stipulation of himself and two competent sureties, for payment of all damages and costs on the appeal in this court and in the Supreme Court of the United States in the full and just sum of ten thousand dollars.

Thereafter, on the 5th day of March, 1870, a paper was placed on the files of this court, purporting to be signed by Charles Demond as "commissioner of the U. S. court for the district of Massachusetts," reciting the proceedings in the cause and the order of this court above mentioned, and certifying that Oakman, on behalf of himself and of the interests represented by Eldridge, appeared and produced for sureties James Lee, jr., and J. Wade Davis, and that the persons so appearing submitting themselves to the jurisdiction of the court, bound themselves, their heirs, &c., * * in the sum of ten thousand dollars unto Charles Sawyer and others (the libellants) "that the said Samuel Oakman shall pay all damages, costs and expenses which shall be awarded against him in this suit; * * * and unless he shall
19 do so, they do hereby consent that execution shall issue forth against them, their heirs, * * * goods and chattels * * *

12 (Endorsed:) Sup. Court U. S., 1874. Octo. term. No. 5.—Original. Ex-parte: In the matter of Charles Sawyer, John B. Brown, Phillip Brown, John Brown, Henry Fox, H. H. Furbush, & William Randall, petitioners. Petition and motion for mandamus on Hon. L. B. Woodruff, circuit judge 2d circuit. Filed 20 November, 1874.

13 Supreme Court of the United States, October term, 1874.

EX PARTE: IN THE MATTER OF CHARLES SAWYER, J. B. BROWN et al., petitioners. } No. 5. Original.

On consideration of the motion and petition for a writ of mandamus, filed in this cause by Mr. C. H. Hill, in behalf of Mr. John Lathrop, of counsel for the petitioners, it is now here ordered by the court that the Hon. Lewis B. Woodruff, judge of the circuit court of the United States for the southern district of New York, show cause on the 18th day of December, 1874, why a writ of mandamus should not issue to him commanding him to cause judgment to be entered against James Lee, jr., and J. Wade Davis, as well as against Samuel Oakman, in a cause pending in said circuit court, entitled Charles Sawyer et al. vs. Samuel Oakman.

30th November, 1874.

14 Circuit court of the United States for the southern district of New York.

CHARLES SAWYER ET AL.
agst.
SAMUEL OAKMAN ET AL.

Return to the rule of the Supreme Court of the United States issued to the judge of the circuit court of the United States for the southern district of New York, to show cause why a peremptory writ of mandamus should not issue commanding him to enter a certain judgment in the above cause, as prayed for in the said libellant's petition herein filed.

To the Supreme Court of the United States:

In return to the above rule received by me through the mail, it is respectfully stated, that the matters and things set forth in the petition of the said Sawyer et al. are substantially correct, and, save as the same are qualified by the statements hereinafter made, they are hereby affirmed.

15 In addition to the above matters I further return:

First. That by a rule of this court, number 133, in full force & operation before & during the time of the proceedings named in said petition, it is provided as follows: "The appellee may move this court to have the decree made in the district court carried into effect, subject to the judgment of this court or of the Supreme Court on appeal, upon giving his own stipulation to abide and perform the decree of such court, and this court will make such order unless the appellant shall give security by the stipulation of himself and competent sureties for payment of all damages and costs on the appeal in this court and in the Supreme Court in such sums as this court shall direct."

Second. That by a rule of this court, also in full operation before & during the pendency of said proceedings, it is provided:

"All stipulations in causes civil and maritime shall be executed by the principal party (if within the district) and at least one surety resident therein. * * * * * * * * Non-resident parties must
16 supply at least two sureties."

Third. That after the order mentioned in the petition directing that the decree of the district court of Massachusetts should be carried into effect, unless the appellants gave security by stipulation, the paper quoted in said petition as bearing date the 4th day of March, 1870, was placed on the files of this court ex parte; that the attention of said court or of any judge thereof was not called to the same, nor was the same ever approved, passed upon, or considered by this court, until the motion was made to set aside the decree as mentioned in said petition.

Fourth. That on the receipt of the mandate of the Supreme Court first-named in said petition, a decree was made ex parte in the usual form of such decree as to stipulators, without production of or reference to said paper dated March 4, 1870, and without notice to the said alleged stipulators.

Fifth. That on motion to set aside the execution issued upon
17 the decree of this court as stated in said petition, the parties were heard by their counsel, and the execution was set aside for reasons stated in the opinion then filed in the words following:

Circuit court of the United States for the southern district of New York.

CHARLES SAWYER ET AL., LIBELLANTS & APPELLEES,
vs.
SAMUEL OAKMAN & OTHERS, APPELLANTS.

WOODRUFF, *Circuit J.:*

A motion has been made herein on the petition of James Lee, jun'r, an alleged stipulator on the appeal from the district court for the district of Massachusetts to the circuit court, which was transferred to this court under and by virtue of sec. 8 of the act of Congress of Feb'y 28, 1839. (5 U. S. Stat. at Large, 322)

After the transfer of the cause to this court, and on the 16 Feb'y, 1870, an order was made (under and in conformity with the 133
18 rule of this court) that the decree of the district court be carried into effect unless the appellants should give security by the stipulation of himself and two competent sureties, for payment of all damages and costs on the appeal in this court and in the Supreme Court of the United States in the full and just sum of ten thousand dollars.

Thereafter, on the 5th day of March, 1870, a paper was placed on the files of this court, purporting to be signed by Charles Demond as "commissioner of the U. S. court for the district of Massachusetts," reciting the proceedings in the cause and the order of this court above mentioned, and certifying that Oakman, on behalf of himself and of the interests represented by Eldridge, appeared and produced for sureties James Lee, jr., and J. Wade Davis, and that the persons so appearing submitting themselves to the jurisdiction of the court, bound themselves, their heirs, &c., * * in the sum of ten thousand dollars unto Charles Sawyer and others (the libellants) "that the said Samuel Oakman shall pay all damages, costs and expenses which shall be awarded against him in this suit; * * * and unless he shall
19 do so, they do hereby consent that execution shall issue forth against them, their heirs, * * * goods and chattels * * *

to the value of the sum above mentioned," and further certifying that the commissioner is satisfied that Lee and Davis are each worth more than ten thousand dollars.

This paper was not signed by the petitioner, or by either of the persons named in it, and is not authenticated save by the commissioner's signature.

A decree was had by the libellants on the appeal and in affirmance of the district court; the libellants were awarded their damages and costs with the usual supplemental clause "that unless an appeal be taken from this decree within the time prescribed by law a summary judgment therefor be entered in favor of the said libellants, appellees, and against James Lee, jr., and J. Wade Davis, (sureties on said appeal in the sum of ten thousand dollars, the amount of their stipulations by them given on said appeal,) and that said appellees have execution therefor
20 to satisfy this decree." But the original respondents Oakman and al. did appeal to the Supreme Court of the United States, and so the condition upon which under such decree such summary judgment was to be entered failed.

The Supreme Court affirmed the decree of this court, and, on the presentation of the remittitur or mandate of that court, final judgment and award of execution was entered in this court, ex parte, against the original respondents, and summary judgment was also awarded against the petitioner, Lee, and J. Wade Davis, as sureties on the appeal to this court, and execution was ordered (pursuant to the act under which the cause was removed) to issue into the southern district of New York and also into the district of Massachusetts. The execution as addressed to the marshal of the latter district directed him, for want of goods, chattels, &c., &c., to take the body, &c.

Upon that execution James Lee, jr., was taken, and thereupon he presented this petition, and moves to set aside the execution and such summary judgment against him on various grounds; one of which
21 alone it will be necessary to consider. I find no statute of the United States which can be construed to authorize a commissioner, appointed by the circuit court of another circuit, to authenticate a stipulation in admiralty by his mere certificate that the proposed stipulators appeared before him, and acknowledged themselves bound, &c. No such statute was cited by the counsel, or insisted upon on the argument upon this petition.

If no such authority exists, then this court had no evidence before it, on the record or otherwise, that the petitioner, James Lee, jr., ever stipulated or became in any manner bound for the damages and costs in this cause, and there was no legal warrant for the decree which, on the presentation of the mandate of the Supreme Court, was entered against the said petitioner. And if no legal stipulation had in fact ever been made by him, then he was not a party to any proceedings in this court or in the Supreme Court.

The mandate of the Supreme Court did not, per se, require this court to enter such a judgment against the petitioner. The decretal
22 order made in this court prior to the appeal to the Supreme Court was provisional, and not final. It directed that, if an appeal was not taken from the decree within the time prescribed by law, summary judgment should be entered in favor of the libellants against the sureties for the amount of their stipulation. Such appeal was taken, and it therefore became necessary to apply to this court, after the decision of the Supreme Court, for a final decree against the original respondents and their sureties and an award of execution.

The sureties had not appealed to the Supreme Court. If the petitioner had not, in fact, legally stipulated, he was in no wise, directly or by implication, a party to the appeal. The Supreme Court made no decision touching the liability of the petitioner. They affirmed the decree as to the appellants, leaving the rights & obligations of all others as if no appeal had been taken. The mandate of the Supreme Court neither directed this court to enter a final decree against the stipulators, nor to award execution against them, but only commanded "that
23 such execution and proceedings be had in said cause as, according to right and justice and the laws of the United States, ought to be had," &c.

As to the appellants and their obligations under the decretal order appealed from, the mandate was conclusive; but as to alleged stipulators, it could have no operation if in truth they had not in some legal manner became identified with the cause, so as to be bound by the decree against them.

It was therefore not too late for the petitioner to apply to this court, so soon as he had information of the decree made here against him on the presentation of the mandate, and show that he was not legally held as stipulator, and therefore that this court had no jurisdiction to enter a summary judgment against him; and I perceive no reason why, after the issuing of execution on such decree made without notice to him, he should not be heard on motion. If, then, no statute authorized a commissioner in Massachusetts to certify to this court the petitioner's appearance and acknowledgment of being bound, &c., to the
24 libellants, the writing not being signed by him or sustained by proof in any form that he ever consented to enter into such obligation save such certificate, this court had nothing before it, legally warranting a summary judgment against the petitioner, unless there is some established practice recognized by the court, or some rule which makes a paper or writing, so certified by a commissioner, valid as a stipulation in admiralty, and a sufficient ground for such summary judgment. And it is proper to add that where there is a valid and authentic stipulation, it is not questioned that a summary decree against the stipulators is regular and proper.

Rule 5 of the rules in admiralty, prescribed by the Supreme Court of the United States, in force at the time the instrument in question was placed on the files of this court, provided that "bonds or stipulations in admiralty suits may be given and taken in open court or at chambers, or before any commissioner of the court, who is authorized by the court to take affidavits or bail and depositions in cases pending before the court." This rule of the Supreme Court imports their opinion
25 that there was no prior general authority under any statute under which any U. S. circuit c't commissioner could take such stipulations, and that, under the power given to the Supreme Court to regulate the practice, that court could confer the authority. And the terms of the rule limit the authority to commissioners of the court in which the cause is pending.

That the rule was thus limited is indicated, not merely by its terms, but by the fact that by a rule adopted at the December term, 1871, & promulgated May 8th, 1872, (13 Wallace, xiv,) the Supreme Court amended this 5th rule by extending the authority to take stipulations to "any commissioner of the United States, authorized by law to take bail and affidavits in civil causes." Thus that court have clearly indicated that without such amendment no commissioner could take a

stipulation, except commissioners of the court in which the cause is pending.

Unless the instrument, which was filed in this court, has some legal sanction as in the nature of a recognizance taken before some
26 officer authorized to take it in the course of legal proceedings in this court, it not only does not warrant a summary judgment, but is liable to the further suggestion that not being signed by the petitioner, and it not appearing by any evidence which the court can judicially recognize as authentic, that the petitioner himself acted upon it, or took thereby any advantage, it may be liable to the objection that, as a voluntary acknowledgment of obligation, it has no validity under the statute of frauds.

To the suggestion that, as the cause was originally pending in the district of Massachusetts, and was transferred to this court for hearing and determination by reason of the disqualification of the judge of the first circuit, this court should be regarded as acting in the place of the circuit court for the first circuit and bound to recognize the act of a commissioner of that court, it is sufficient to say that, by the statute, the cause is itself transferred, with all its record and proceedings, into this court, to proceed here and judgment to be pronounced here as if
27 the cause had been commenced here. Whatever, therefore, is done here must be so done that it would be valid in a suit commenced here. Whatever was done before the removal has all the force it would have if the cause had not been removed. What is afterwards done must be valid in this court or it is not valid at all. This court is not pro hac vice removed to the district of Massachusetts; but the cause itself is removed to this circuit and district. Had Congress seen fit to direct in case of such disqualification that the circuit judge of this circuit should hold the circuit court for the district of Massachusetts and hear and determine the cause, the suggestion would be pertinent.

Once more: By the rule 136 of the circuit court for the southern district of New York, in all civil causes of admiralty and maratime jurisdiction not expressly provided for by specific rules of that court, the rules of the district court for the southern district of New York are adopted, and are to be received as rules of practice in the circuit court. And by the 59th of the rules of the district court, "all stipulations in
28 causes civil and maratime, shall be executed by the principal party (if within the district) and at least one surety resident therein." Without enquiring whether this term "executed" can be construed to mean anything short of a signing of the stipulation itself by the persons to be bound thereby, it is quite plain that the paper relied upon by the libellants as against the petitioner here finds no support in these rules.

If I had a right to consider this subject extra-judicially, I might think that the petitioner did in fact appear before the commissioner in Massachusetts with intent to become bound to these libellants, and did consent to be bound, and that judgment might be summarily entered against him and execution be issued; that the libellants acted or forbore to enforce the decree of the district court in reliance upon such appearance and acknowledgment, and that by this motion the petitioner is seeking to evade the responsibility which he intended to assume and upon which he knew the libellants would rely; but I cannot judicially upon
29 the face of the instrument in question say that he did in fact incur any such responsibility. The libellants were at full liberty to disregard it as not conforming to the order made by this court for the giving of security to stay the execution of the original decree and as not authorized by the rules of the Supreme Court or of this court.

I am constrained to the conclusion that the entry of the summary judgment against the petitioner on the return to this court of the mandate of the Supreme Court was improvident & unwarranted, and that the execution against the petitioner should be set aside.

Sixth. That at the said hearing it appeared that one of the respondents in said cause, to wit, Benjamin W. Eldridge, named in the decree and execution and against whom the same were issued, died prior to the 4th of March, 1870; also that the said paper named in the said petition, and bearing date March 4, 1870, was made and the acknowledgments therein related were also made in the district of Massachu-
30 setts. Also that Charles Demond, in said paper named, was not a commissioner of the circuit court for the southern district of New York, nor was he ever specially commissioned to take a stipulation in said cause.

Seventh. That thereafter, and after the said mandate was recalled as stated in said petition, and a new mandate was issued and presented to this court, with a motion for a decree and execution against said Oakman and said Lee and Davis, counsel were again heard, and the court refused to issue execution or render judgment against the said Lee and Davis for the reasons stated in the opinion given upon said motion in the words following: "I have given to this case the consideration which the importance of the motion made by the libellants seems to require. I remain of the opinion heretofore expressed upon the questions raised thereby, and my opinion, delivered when the motion to correct the former judgment was decided, must therefore be taken as my opinion on
31 this motion. Judgment must be entered pursuant to the mandate of the Supreme Court for the amount of the decree with interest and costs, but not against James Lee, ju'r, and J. Wade Davis, who were claimed to have become sureties under an order made pursuant to the 133d rule of this court, but of whom this court is not deemed to have acquired any jurisdiction to enter any summary judgment against them by virtue of anything done under such order."

Dated New York, December 15th, 1874.

(Signed) L. B. WOODRUFF,
Circuit Judge of the Second Judicial Circuit of the United States.

(Endorsed) Sup. Court U. S. 1874, Octo. Term. No. 5.—Original. Ex parte: In the matter of Charles Sawyer, John B. Brown, P. Brown, H. Fox, et al., petitioners. Return to rule, filed 16th December, 1874.

REC. 5—ORIG.—2

O

Supreme Court of the United States.

CHARLES SAWYER ET AL.,

PETITIONERS FOR MANDAMUS.

BRIEF ON BEHALF OF THE PETITIONERS.

JOHN LATHROP, *Counsel for the Petitioners.*

BOSTON:
ALFRED MUDGE & SON, LAW PRINTERS, 34 SCHOOL STREET.
1875.

Supreme Court of the United States.

CHARLES SAWYER ET AL., PETITIONERS.

STATEMENT OF FACTS.

Petition for a writ of mandamus. The facts as they appear from the petition and return are in brief these: In 1869 the petitioners were the appellees in a cause in admiralty pending in the Circuit Court of the United States for the Southern District of New York. On April 15, 1869, in pursuance of the 133d rule of that Court, they filed their stipulation in said Court. Thereupon an order was passed, reciting that the appellees had complied with the 133d rule, and ordering that the decree already made should be carried into effect, unless the appellants should, within twenty days from the date of the order, give security by the stipulations of himself and of two competent sureties for judgment of all damages and costs on the appeal in this Court and in the Supreme Court of the United States, in the full and just sum of $10,000.

In pursuance of this order a stipulation was entered into by the appellants and James Lee, Jr., and J. Wade Davis, before Charles Demond, a Commissioner of the United States Circuit Court for the District of Massachusetts. In this, the parties submitted themselves to the jurisdiction of the Court, and bound themselves that the said Oakman should pay all damages, costs and expenses which should be awarded against him in this suit, upon the final adjudication thereof; and unless he should do so, they consented that execution should issue forth against them.

This stipulation was filed in Court on the 5th of March, 1870; and thereupon the Court proceeded to consider the case on its merits; and on the 11th of June, 1870, the Court rendered its decision, affirming the decree of the District Court; and on the 20th

of November, 1870, the final decree was entered against the appellants; and it was further ordered, "that, unless an appeal be taken from this decree within the time prescribed by law, a summary judgment therefor be entered in favor of the said libellants, appellees, and against James Lee, Jr., and J. Wade Davis (sureties on said appeal in the sum of ten thousand dollars, the amount of their stipulations by them given on said appeal), and that said appellees have execution therefor to satisfy this decree."

The case was afterwards taken by appeal to the Supreme Court, and the judgment of the Circuit Court affirmed, and a mandate issued. In accordance with this a decree was drawn up, entering judgment against the appellants and their sureties, and execution issued. This execution was, on motion, set aside as against James Lee, Jr., on the ground that the stipulation was not part of the record, it not having been entered into before the Court, or a commissioner thereof; and that therefore a summary judgment should not have been entered against said sureties.

At the hearing, it also appeared that the judgment was rendered against Benjamin W. Eldridge, who had before deceased; and further proceedings were had in the Supreme Court to rectify the mistake of the clerk in issuing the mandate in this form. A new mandate was then issued and filed in the Circuit Court, and the question now is, whether that Court should on the new mandate, have entered judgment and issued execution against the sureties, James Lee, Jr. and J. Wade Davis, as well as against Samuel Oakman.

BRIEF.

I. Mandamus is an appropriate remedy in this case.

"It issues to the judges of any inferior Court, commanding them to do justice, according to the powers of their office, whenever the same is delayed." 3 Bl. Com. 110. The same learned writer remarks that it may be issued in some cases where the injured party has also another more tedious method of redress; and in all cases where there is no other remedy. 3 Bl. Com. 110.

In Perkins *v.* Fourniquet, 14 How. 328, 330, the question came before the Court on an appeal by the respondent from an order of the

Circuit Court as to the amount of interest to be allowed on a judgment ordered to be made by this Court.

Taney, C. J., "An objection has been made to the manner in which this case has been brought before the Court, and a motion made to dismiss upon the ground that an appeal will not lie from this decision of the Circuit Court.

"This objection to the form of proceeding involves nothing more than a question of practice. The mandate from this Court left nothing to the judgment and discretion of the Circuit Court, but directed it to carry into execution the decree of this Court, which was recited in the mandate. And if the decree of this Court has been misunderstood, or misconstrued, by the Court below, to the injury of either party, we see no valid objection to an appeal to this Court, in order to have the error corrected. The question is merely as to the form of proceeding which this Court should adopt to enforce the execution of its own mandate in the Court below. *The subject might, without doubt, be brought before us upon motion, and a mandamus issued to compel its execution;* but an appeal from the decision of the Court below is equally convenient and suitable, — and perhaps more so in some cases, as it gives the adverse party notice that the question will be brought before this Court, and affords him the opportunity of being prepared to meet it at an early day of the term. The appeal would not, certainly, stay proceedings; and it would be the duty of the Circuit Court, notwithstanding the appeal, to proceed to execute the judgment of this Court, unless, as in this case, he entertained doubts of its construction and meaning, and deemed it, therefore, just and equitable to suspend its execution until the decision of this Court could be had in the premises."

It is to be noticed that the learned judge in this case considers the right of the aggrieved party to have the case determined in this Court by mandamus an undoubted one.

An appeal was as advantageous because as the respondent appealed the plaintiff might bring the matter at once before the Court on a motion to dismiss the appeal. But if the decree below had been for the respondent, and the plaintiff had appealed, the respondent would not have been interested to have the question speedily

determined, and he would not have moved to dismiss the appeal. Mandamus in such a case would be the only speedy remedy.

In United States *v.* Peters, 5 Cranch, 115, a mandamus issued to direct the judge of a District Court to issue process to compel obedience to the sentence of that Court.

In Stafford *v.* Union Bank of Louisiana, 17 How. 275, an appeal was taken in chancery. The judge of the Circuit Court approved a bond in too small an amount, and the Supreme Court held that the bond did not operate as a *supersedeas*, and a mandamus issued directing the judge of the District Court to carry into effect the judgment of the Court below.

In *Ex parte* Dubuque & Pacific Railroad, 1 Wall. 69, the Court below ordered judgment for the plaintiff. On appeal, the Supreme Court reversed the judgment, and sent down a mandate ordering judgment for the defendant. The lower Court did this, and immediately ordered a new trial. A mandamus was issued to the lower Court commanding it to vacate the order granting a new trial, and that judgment be entered in conformity with the order of this Court.

II. Assuming that the judgment entered in the Circuit Court in November, 1870, was a judgment against the sureties as well as against the principals, it is clear, that, after the mandate from the Supreme Court affirming the judgment, the Circuit Court had no power to revise the judgment.

Sibbald *v.* U. S., 12 Pet. 488, 492.
Ex parte Dubuque R., 1 Wall. 69.

Thus, if a case, after having been before the Supreme Court comes before it again, the objection cannot be taken that the Court had no jurisdiction over the first appeal.

Washington Bridge Co. *v.* Stewart, 3 How. 413.
Whyte *v.* Gibbs, 20 How. 541.
Wittenbury *v.* U. S., 5 Wall. 819, 821.
See also *Ex parte* Morris, 9 Wall. 605.

III. The judgment against the sureties rendered by the Circuit Court in November, 1870, was a final judgment against them and not a conditional judgment.

The decree was, that the appellees should recover against the appellants, and that, unless an appeal should be taken within the time prescribed by law, a summary judgment therefor be entered in favor of the libellants, and against James Lee, Jr., and J. Wade Davis (sureties on said appeal).

If this was not a final judgment against the sureties, it was not a final judgment against the principals. Both, so far as the judgment is concerned, stand on the same footing. If it was not a final judgment, the Supreme Court had no jurisdiction; but we have seen that the question of jurisdiction cannot be raised.

If the words "unless an appeal be taken from this decree within the time prescribed by law" be stricken out, it is clear that the judgment is final against the sureties and against the principals. The insertion of these words can make no difference in the effect of the decree. The decree simply states in words what is implied by law, and may be stricken out as surplusage. The expression of what is tacitly implied adds nothing to the force of the implied condition or reservation. *Expressio eroum quæ tacite insunt nihil operatur.* Broom's Max. (4th ed.), 642. If these words were out, execution could not issue in case of an appeal; and the judgment would be suspended. The effect of the decree is to order judgment against the principals and sureties; and they thereupon had the right of appeal. The sureties did not appeal, and they are precluded. The principals did appeal, though not from this decree; and the judgment was affirmed. The mandate, after reciting the judgment and stating that it was affirmed by the Supreme Court, commands "that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding." All that remained for the Circuit Court to do was to issue execution in accordance with the judgment.

The decree of November, 1870, for execution was conditional; but the judgment was absolute.

In considering the effect of the decree rendered, it is worthy of

notice that it does not follow the usual form. Benedict, Sect. 547, says, "If the suit be *in personam*, and the decree be for the libellant for a sum certain, the usual form of the decree is, that the libellant recover against the defendant and his stipulators the amount, with costs to be taxed, and that he have execution therefor." Form 198, on p. 660 of Benedict, is to the same effect.

In the decree in our case, the clerk has inserted what is implied by law; but this cannot affect the construction of the decree, or make it conditional if it would otherwise be final.

Even if the decree against the sureties be regarded as conditional, the condition was, that an appeal should be taken from it within the time allowed by law. The opinion heretofore given assumes that this was done; but this is an error. The record shows no appeal from this decree. The appeal was taken from the decree of June 11, 1870. The effect of this appeal was to prevent the issuing of an execution under the decree against the sureties; but this was by virtue of the law, and not by virtue of any condition contained in the decree of November 20.

See Silsby *v.* Foote, 20 How. 290.
Wheeler *v.* Harris, 13 Wall. 51.

It is suggested that there is nothing in the mandate specially directing judgment against the sureties; but the mandate, after reciting the decree against the sureties as well as against the principal, affirms the whole decree, and directs such execution and proceedings as to right and justice and the laws of the United States ought to be had, said appeal notwithstanding. The decree below stands with the addition of costs and interest; and the only question is as to the execution. There is no more need of a new judgment against the sureties than there is of one against the principal.

It is the practice in some districts, on the mandate being returned, to enter a formal judgment against the principal as well as against the sureties; but this does not entitle the principal to open the decree rendered against him in this Court, nor can the surety open it. In the District of Massachusetts the practice is not to enter a formal decree in such a case against any one. The clerk computes the interest on the affirmed decree, enters the amount with costs on his

docket, and issues execution. Under either practice the true theory is, that the decree itself is not affected by the appeal, but only the execution of it.

IV. If the foregoing propositions are sustained, it follows that judgment should have been entered against the stipulators, and execution issued.

The case stands thus: The Court below ordered the appellants to file a stipulation. They did so. The Court thereupon proceeded to determine the case, and ordered judgment recognizing the validity of the stipulation, and that an execution should issue against the stipulators. An appeal was taken, but not by the stipulators, and the judgment is affirmed, and the judge below is directed to issue such execution and proceedings as to right and justice and the laws of the United States ought to be had, said appeal notwithstanding. The judge then ordered judgment against the stipulators, as he says, in the usual manner. It is respectfully submitted that it was too late after this for the Court below to go into an examination of the validity of the stipulation and to set aside the decree and stay the execution.

It is also submitted that the reasons assigned by the learned judge, and numbered by him 3d and 4th, are not sufficient reasons why the prayer of the petitioners should not be granted.

The petition avers that the stipulation was filed on March 5, 1870 (Record, p. 1). The return says that it was filed *ex parte* (Record, p. 5). Papers are generally so filed.

In Cook *v.* Berth, 108 Mass. 73, the action was contract upon a recognizance entered into before a justice of the peace, on an appeal to the Superior Court from the judgment rendered by the justice. It appeared that the recognizance sued on was different from that sent with the papers on appeal, and that the magistrate had made an amended recognizance, which was the one sued on; that this had been sent to the clerk of the Court, who had put it among the papers in the case, and had indorsed upon it "Rec'd Nov. 19, '69, J. M." (these being the initials of the clerk's name.) The questions were, 1st, whether the paper was filed; and 2d, whether, as it did not appear of record that the Court had allowed the amendment to be

filed, the paper was part of the record. The Court held that the filing was sufficient, and that it had been recognized and admitted by the Superior Court as properly of record in that Court, and that this was conclusive, and was equivalent to a direct authority to make the amendment.

See also Commonwealth *v.* Cheney, 108 Mass. 33.

The stipulation was also sent to this Court in the former record, which was certified by the clerk of the Circuit Court to be a true copy of the record of that Court.

The petition avers that thereupon (that is on the filing of the paper) the Court proceeded to consider the case on its merits, and ordered judgment and execution (Record, p. 2). The return does not deny these allegations, but sets up that the attention of the Court was not called to the same, nor was the same approved of, passed upon or considered, until after the decree was made (Record, p. 5).

The learned judge does not assert that the record shows these facts, and they must be treated as his recollections, in 1874, of events in one of the numerous cases pending in his Court four years before.

The record does show that he proceeded to consider the case, when, to have done so, until the stipulation ordered was given, would have been in contravention of the rule of the Court. The record also shows that he signed this decree of November 20, 1870, which recognized the stipulation. It is respectfully submitted that it hardly lies in the mouth of a judge to plead ignorance of the existence of a document filed in his Court, the existence of which he has recognized by his official conduct and by his official signature.

In considering the reasons assigned in the opinion of Judge Woodruff, I shall do so in a slightly different order from that followed by the learned judge.

On p. 8, par. 26, the instrument in question is treated as if it were in the nature of a recognizance. This, it is submitted, is a fundamental error.

V. The instrument in this case was not a common law recognizance, but an admiralty stipulation, given on appeal, and is to be construed, not by the rigid rules of the common law, but by well-settled principles of admiralty law.

At common law, the only remedy of an obligee of a bond is by a suit on the bond itself; and the only remedy of a recognizee is by *scire facias* on the recognizance, if it is required to be returned into Court. If it is not required to be so returned, an action based on the contract is the proper remedy. Sewall *v.* Sullivan, 108 Mass. 355. If the recognizance must be returned to Court, it must become a part of the record to enable a suit upon it to be brought. A bond, however, need not be a matter of record; and although a statute provides that *scire facias* may be brought on a bond, it need not be a matter of record.

An admiralty stipulation, though in the form of a recognizance, is not one, and is more like in its effect a bond.

The practice in respect to the form of proceeding against stipulators differs in different districts. In some, the practice is to issue a summary execution. In others, the practice is in the first instance to issue a monition to show cause.

In either case, the jurisdiction of the Court is not based upon the theory that the stipulation is a matter of record, but proceeds upon the ground that the stipulators, by entering into the stipulation, have become parties to the suit, and that the Court having jurisdiction over the principal cause has jurisdiction necessarily over all its incidents, and may enforce its decrees against all who become parties to the proceedings. See Grimes v. Travis, 4 Litt. Ap

If the jurisdiction depended upon the fact that the instrument must be a matter of record, it would follow that, inasmuch as the English Court of Admiralty was not, until within a comparatively recent period, a Court of record, it could not have had jurisdiction over a stipulation. But this jurisdiction has always been maintained; nor is any regard paid to the form of the instrument. Whether it is in the form of a stipulation or of a recognizance, whether in the form of a bond under seal, or of one not under seal, the admiralty regards it simply as a stipulation, and treats the stipulators or sureties as parties before the Court.

In Lane *v.* Townsend, Ware, 286, it was held that any instrument taken to secure the appearance of a party to answer a libel in the admiralty is to be considered not as a bail bond at common law, but as an admiralty stipulation, and construed according to the rules and practice of the Courts of admiralty touching such stipulations, and that "stipulations taken in the progress of a cause, for the purpose of sustaining and rendering effectual the jurisdiction of the Court, are to be interpreted as to the extent and limitation of the responsibility created by them, by the intention of the Court which required them, and not by the intention of the parties who are bound by them.

The admiralty practice is founded upon the civil law.

By this law, a stipulation had a well-defined meaning. It was an agreement entered into in a certain form, not signed or acknowledged before any one, and herein differed from a recognizance at common law.

Gaius, Elements of Roman Law, by Poste, p. 334.

It did not even require a consideration.

1 Browne, Civ. & Adm. Law, 358.

Stipulations in admiralty were formerly never signed. At the present day, they are sometimes signed, owing to the fact that persons who have entered into them have denied the fact. But there is no law requiring them to be signed.

In Marriott's Formulary are several precedents of stipulations given, and none are signed. Pp. 218, 219, 347, 348, 354. See also Dunlap's Adm. 495.

"The origin of the name (stipulation) is said to be *stipula*, the straw of old delivered as token of consent." 2 Browne, Civ. & Adm. Law, 398.

A different derivation is given in Greenway & Barker's case, Godb. 260, where Dr. James, speaking of a stipulation, uses this language, "Which word is derived *à stipite*, by which the party is tyed as a Bear to the stake, or as Ulisses to the Mast of the ship." So Justinian, Lib. 3, tit. 16, derives stipulation "*forte à stipite*," which Cooper, p. 248, translates, "probably from *stipes*, the trunk of a tree."

An early case in England is mentioned by Prynne in his Animadversions on the Fourth Institute of Coke, pp. 123, 124. The action was *in personam* for freight; and the defendant gave bail. Judgment was given for the plaintiff; and the defendant appealed to the delegates, and soon after died The case was taken to the House of Lords on a writ of prohibition; and in 1645 they ordered the delegates to proceed; and they "soon after confirmed the judgment given for Mr. Johns (the plaintiff) upon these foreign contracts, who had execution granted against the bail, and recovered his debt and costs against them."

In Brymer *v.* Atkins, 1 H. Bl. 164, a stipulation on appeal was taken before a vice-admiralty Court in the form of a legal recognizance, running to the king. Proceedings being had in the admiralty on this instrument, a writ of prohibition was applied for, and denied. Lord Loughborough delivered the opinion of the Court: "It has been truly said that a strict recognizance, being an acknowledgment of a debt to the king on record, cannot be taken in a Court not of record. But this security, though bearing the form of a recognizance, is improperly so called, not being a recognizance in reality. It has none of the attributes of a recognizance; it could not be proceeded upon as such, nor in its consequences is it like a legal recognizance. . . . Operating, therefore, as a stipulation, execution upon it belongs to that Court and that jurisdiction to which the parties have agreed to submit." p. 188.

Page 175, counsel arguing, said, "The term recognizance means, in its true signification, nothing more than an acknowledgment; applied to a Court of record, it means an acknowledgment of a debt on record; in the present case, though an acknowledgment of a debt to the crown, it means no more in effect than a stipulation which a Court of admiralty may clearly take, and corresponds with the description given by Vinnius of a stipulation. There is no substantial difference between an agreement to pay a sum of money and an acknowledgment of a sum of money being due; they differ only in name."

In The Nied Elwin, 1 Dods. 53, Sir W. Scott uses this language: "Now I cannot entirely accede to the position which has been laid down on behalf of the claimant, that these bonds are mere personal

securities, given to the individual captors; because I think they are given to the Court as securities, to abide the adjudication of all events impending before it. This Court is not in the habit of considering the effect of bonds precisely in the same limited way as they are viewed by the Courts of common law. In those Courts they are very properly considered as mere personal securities, for the benefit of those parties to whom they are given. In this place they are subject to more enlarged considerations; they are here regarded as pledges or substitutes for the thing itself."

In The Brig Alligator, 1 Gallis. 145, 149, where property was delivered on bail, Story, J., said, "In what manner this security is taken, whether by a sealed instrument or by a stipulation in the nature of a recognizance, cannot affect the jurisdiction of the Court. Without doubt, unless a different rule were prescribed by statute, the best course would have been to take an admiralty stipulation. But a bond, even supposing it were void, as such, which is not admitted, might yet be good as a stipulation. (Comth. *v.* Lacaze, 2 Dall. 118. See also 1 H. Bl. 164.) In all cases of this nature, the security, whatever may be its form, is taken by order of Court upon the voluntary application of the party, and therefore is *apud acta*. Having jurisdiction of the principal cause, the Court must possess jurisdiction over all the incidents, and may, by monition, attachment or execution, enforce its decrees against all who become parties to the proceedings."

In this case, property had been delivered on the claimant giving an ordinary bond It was contended that there was no statute authorizing the delivery on bond; but Story, J., said that the claimant made a voluntary application for the delivery on bond, and that it was immaterial whether any statute authorized the delivery on bond or not; that the cause was a civil cause of admiralty and maritime jurisdiction, and that nothing was better settled than that the admiralty might take a *fide jussory* caution or stipulation in cases *in rem*, and might in a summary manner award judgment and execution thereon, and that the form of the stipulation made no difference.

So in The Vreede, 1 Dods. 1, where property proceeded against *in rem* was delivered up on a common law bond, a monition was taken out against the parties, to bring in the value of the property; and

on their refusal, an attachment was granted against the sureties; and one of them was compelled to pay, although there had been a delay of nine years, and the principal and one of the sureties had become bankrupt.

The cases of Gaines *v.* Travis, Abbott, Adm. 422, and Holmes *v.* Dodge, *id.* 60, also proceed upon the ground that the stipulators are parties to the suit.

That stipulators are parties to the suit is shown by the fact that their liability may be considered on an appeal of the principal case, as was done in Newell *v.* Newton, 3 Wallace, 257.

VI. The effect of the admiralty rules. The old 5th admiralty rule was as follows: "Bonds or stipulations in admiralty suits may be given and taken in open Court, or at chambers, or before any commissioner of the Court, who is authorized by the Court to take affidavits of bail and depositions in cases pending before the Court."

The 35th rule provides that "Stipulations in admiralty and maritime suits may be taken in open Court, or by the proper judges at chambers, or under his order by any commissioner of the Court, who is a standing commissioner of the Court, and is now by law authorized to take affidavits of bail, and also depositions in civil causes pending in the Courts of the United States."

1. It is first to be noticed that these rules are not mandatory or restrictory, but are directory only. The language is not "shall be," but "may be." The rules do not say that a stipulation shall be taken in this way, and in no other; nor do they say that one taken in any other way shall be void.

In Gates *v.* Johnson, U. S. C. C. Ohio, 21 Law Reporter, 279, derelict property picked up by the libellants was deposited with the respondents, who delivered it over to third parties. It was contended that the suit would not lie under the 19th admiralty rule. McLean, J., said, "The rules in admiralty, prescribing proceedings in certain cases, were not to be regarded as restrictive, but only as enumerative of the more common remedies, leaving such other and further proceedings to be had by the Courts as might be found necessary, in any case, to give effect to their jurisdiction."

2. The fair inference from these rules is, that any United States Commissioner in one district, who could there take either an affidavit or acknowledgment of bail, or a deposition which could be used in a case pending in another district, can, under similar circumstances, take a stipulation.

In regard to acknowledgment of bail and affidavits, the power of a commissioner is derived from the acts of 1812 and 1817.

The act of 1812, c. 25, 2 Stats. at Large, 679, provides, that "It shall be lawful for the Circuit Court of the United States to be holden in any district, . . . to appoint such and so many discreet persons in different parts of the district as such Court shall deem necessary to take acknowledgments of bail and affidavits; which acknowledgments of bail and affidavits shall have the like force and effect as if taken before any judge of said Court."

The act of 1817, c 30, 3 U. S. Stats. 350, authorizes the commissioners appointed by the above act "to take affidavits and bail in civil causes to be used in the several district Courts of the United Statet," and also gives them "all the powers that a justice or judge of any of the Courts of the United States may exercise, by virtue of the thirteith section of the act entitled 'An Act to establish the Judicial Courts of the United States.'" Under this act, which is the act of 1789, c. 20, sect 30, 1 U. S. Stats. at Large, 88, depositions *de bene esse* may be taken "before any justice or judge of any of the Courts of the United States."

The act of 1817 seems clearly to authorize the taking of affidavits and bail in one district where the cause is pending in another; and unless the act of 1812 confers an equal right, where the case is pending in the Circuit Court, it must be that the language of the act so clearly shows the contrary that the act is not capable of this construction. The act, however, says that the acknowledgment "shall have the like force and effect as if taken before any judge of said Court," — that is, any judge of the Circuit Court. That a more restricted construction may be put upon the language is admitted; but that there is no reason for such a limited construction is shown by the new 5th admiralty rule.

However this may be, it is clear that a deposition *de bene esse* may

be taken by a commissioner in one district where the case is pending in another.

In Whitney *v.* Huntt, 5 Cranch, C. C. 120, a deposition taken by a commissioner of the U. S. District Court of Louisiana, which Court had the power of a Circuit Court, was offered in evidence in the U. S. Circuit Court of the District of Columbia.

The defendant's counsel objected that the commissioners under the act of 1812 were only authorized to take depositions in causes depending in their own Courts or in the district Courts under the act of 1817, and that the appointment of the commissioner should be authenticated by the record. Both of these objections were overruled. No opinion was given; but as one of the three judges dissented, it appears that the question was considered.

In Judge Woodruff's opinion no reference was made to the 35th rule. In May, 1872, this rule is abolished, and the following addition made to the 5th rule, "or any commissioner of the United States, authorized by law to take bail and affidavits in civil causes." No statute had been passed between the making of the 5th and 35th rules and the addition to the 5th rule, applicable to the subject; and unless the Court intended to express in one rule what had previously been included in two rules, or to make the rules on the subject conform to the statutes, it is difficult to see how the Court had the power to make the addition to the 5th rule. The power to make rules is derived from the act of 1842, c. 188, 5 U. S. Stats. at Large, 518. In The Kentucky, 4 Blatchf. C. C. 450, *Nelson*, J., speaking of this act, said, "I think it proper to say, that the general understanding of that act has been, that the Court had no power to repeal or modify any regulation of Congress existing on the subjects there referred to."

If, therefore, the proposition is correct that a stipulation may be taken before any commissioner who is authorized to take a deposition in a cause pending before the Court, it follows that, as the commissioner in this case was authorized to take a deposition *de bene esse*, he was authorized to take the stipulation.

Another view of this case may be taken which leads to the same result.

It is certainly an inherent authority in Courts of admiralty to

appoint special commissioners to take stipulations; and this is the well-settled practice of the English admiralty.

It is true that the record in this case does not show the appointment of a special commissioner. But it does not show that he was not appointed. His appointment may be inferred from the facts which do appear upon the record, viz. that a stipulation was ordered, that a document was filed and became part of the record, in which the stipulators submitted to the jurisdiction of the Court, and acknowledged that they were bound; that the Court treated it as a valid stipulation, and considered the case, and rendered judgment, and allowed the parties an appeal to the Supreme Court, which it would not have done had it not considered the stipulation as valid.

VII. The stipulation may also be considered as taken before the Court. Although taken before a Massachusetts commissioner, it had a continuing effect. It was taken in the case. The parties submitted to the jurisdiction of the Court. They filed it in Court; and when they did so, they may be presumed to have acknowledged it there. The record does not show this, it is true; but it does not show the contrary.

"The commissioner is an officer appointed by the Courts of the United States; and his official acts are *prima facie* valid. Hoyt *v.* Hammekin, 14 How. 350, where this was said in answer to the objection that the record did not show that the commissioner had been sworn. See also Whitney *v.* Huntt, 5 Cranch, C. C. 120.

At common law, the principle, "*Omnia præsumuntur rite esse acta*," has been frequently acted upon.

Thus, in State *v.* Benton, 48 N. H. 551, an order was made in term time, as follows: "Defendant to recognize in $200." After the adjournment, the defendant recognized before the clerk; and the order was construed as giving the clerk authority to take the recognizance in vacation.

In Bodine *v.* Commonwealth, 24 Penn. State, 69, the recognizance which appeared on its face to be taken and acknowledged before the clerk, and signed by the clerk, was presumed to be the act of the

Court; and the words, "taken and acknowledged before me" were rejected as surplusage.

So in Bowles *v.* Page, 20 Wis. 309, under a statute requiring an appeal bond to be approved by a judge, it was held, that, where no objection was made, and the bond was placed among the papers on file, this would be deemed sufficient.

In Davidson *v.* Lanier, 4 Wall. 453, it was objected that the appeal bond was not approved by the judge; but it was held to be a fair inference that he had attended to his duty, and had approved the bond.

In Martin *v.* Hunter, 1 Wheat. 361, it was objected that it did not appear that the judge who granted the writ of error did, upon issuing the citation, take the bond required by the judiciary act. The Court held that the provision was merely directory, and that the presumption of law was, that every judge who signs a citation has obeyed the injunctions of the act.

In Barkley *v.* The State, 1 Meigs, 93, where a recognizance entered into before a justice has been filed in a Court of record, it was held that it became part of the record; and its verity could not be impugned by a plea of *non est factum.*

See also Cook *v.* Berth, 108 Mass. 73; Commonwealth *v.* Cheney, 108 Mass. 33.

In Waldo *v.* Averett, 1 Scam. 487, a statute required an appeal bond to be entered into in the office of the clerk, and the security to be approved by him. The bond was written by the clerk, and handed to the appellants, to be signed by them and their sureties; which was accordingly done (though not in the office), and the bond lodged in the office with the clerk, who thereupon issued a *supersedeas.*

The Court said, "This we are of opinion was a substantial compliance with the provision of the statute that requires the appeal bond to be entered into in the office of the clerk, and the security to be approved by him. Although the bond was not signed in the clerk's office, it was lodged there as the law requires, and must have been approved by the clerk; otherwise, he had no authority to al-

low an appeal, and to issue a *supersedeas* enjoining the justice from proceeding in the cause."

If such be the rule at common law, how much stronger must it be in admiralty!

In Cooper's Justinian, p. 269, it is said, —

"It is a general rule in all *fide-jussorial* stipulations, that whatever is alleged in writing to have been done is presumed to have been actually done; therefore if a man in writing confesses that he has become a *fide jussor*, it is also presumed that the necessary forms were observed."

VIII. Assuming, for the purposes of the argument, that the stipulation in this case was not in the form contemplated by the admiralty rules, and that it was not taken before the officer designated by those rules, the question is then presented, whether the stipulators can now avail themselves of the irregularity.

It is confidently asserted, that, by the doctrine of *estoppel*, this defence is not open to them.

In Merchants' Bank *v.* State Bank, 10 Wallace, 645, the Court uses this language: "Estoppel *in pais* presupposes an error or a fault, and implies an act in itself invalid. The rule proceeds upon the consideration that the author of the misfortune shall not himself escape the consequences, and cast the burden upon another. See Dair *v.* United States, 16 Wall. 1.

By the express terms of the stipulation which they filed in Court, Samuel Oakman, James Lee, Jr., and J. Wade Davis submitted themselves to the jurisdiction of the Court, and agreed that all damages, costs and expenses which should be awarded against Oakman upon the final adjudication of the suit, or upon any interlocutory order in the progress thereof, should be paid.

If, by the filing of this paper, they did not become parties, then a person upon whom process is not legally served, but who voluntarily appears, is not a party, and can obtain an arrest of judgment.

In The brig Struggle, 1 Gallis. 476, the claimants had obtained property by giving bail for its appraised value. The vessel being condemned, a motion was made that the bond should be discharged, on the ground that it did not conform to the statute. Story, J.,

said, "The question is not new, and I am entirely satisfied that where the claimant voluntarily accepts a delivery on bail, it is an estoppel of his right to contest the validity of the security. He accepts or not at his pleasure; and it would be grossly inequitable, if he might lie by until the close of the cause, receive and use the property, and then, by detecting an error in the bond, set the whole judgment of the Court at defiance."

In United States *v.* Four Part Pieces of Woollen Cloth, 1 Paine, 435, goods were delivered on a bail bond. Held, that, although the case was not regularly within a certain section of the collection law, yet, as the bond had been voluntarily given, it could be enforced.

The process was summary against one of the sureties. Held, that it could be enforced.

The objection was also taken, that the bond was to pay the sum into the District Court, and that, as the case had been removed by appeal to the Circuit Court, the case was out of the District Court, and the bond could not be enforced. But this objection was overruled.

So, too, as a stipulation is the proper form in admiralty, a surety on a bond could not, strictly speaking, be held; but, as we have seen, the form is entirely immaterial. The principal, by obtaining a benefit, cannot say that the instrument is not in the form required. And the sureties are also estopped; for it is well settled that a benefit derived by the principal is a benefit derived by the surety. Thus, in United States *v.* Linn, 15 Pet. 290, 314, the Court say, "A benefit to the promisor or damage to the promisee constitutes a good consideration. If Linn received a sufficient consideration to uphold the promise on his part, it was sufficient to bind the sureties. There was no necessity for any consideration passing directly between the plaintiffs and the sureties. It was one entire and original transaction; and the consideration which supported the contract of Linn supported that of his sureties."

So, in McCabe v. Raney, 32 Ind. 309, it is held that any act of a principal which estops him from setting up a defence personal to himself, operates equally against his surety. Thus, where the maker of a note informed a person who was about to buy it that the

note was good, it was held that he was estopped to deny it, and so was a surety on the note.

And in Smith *v.* Whitaker, 11 Ill. 417, it was held, in an action on an appeal bond, that the defendant was estopped to deny that there was such a judgment as was recited in the condition of the bond sued on. "If the statute made the amount of the bond imperative, the bond would not be void It would still be good as a voluntary obligation, based on the voluntary consideration of having the case reviewed in the Circuit Court, and of delay to the appellee in the collection of his judgment."

It is also to be noticed that the admiralty rules are only directory.

Even at common law, the fact that the bond is not in the form prescribed by statute or by rule of Court does not make the bond void. The formalities required are considered merely as directory, and meant for the benefit of the obligee; and, being for his benefit, he can waive them.

Thus, in United States *v.* Linn, 15 Pet. 290, the bond, though not under seal, as required to be by act of Congress, was held to be a valid bond.

In Dowlin *v.* Standifer, Hemp. 290, a statute required a recognizance on appeal. A bond was held to be good. The Court said, "Though it is not a strict compliance with the statute, yet the securities, having bound themselves in a bond substantially good, cannot take advantage of their own act to defeat a recovery upon it."

In Gibbons *v.* Berhard, 3 Bosw. 635, a provision of the code that an undertaking upon an appeal should be of no effect unless accompanied by the affidavit of the sureties that they were worth a sum double the amount specified therein was considered to be for the benefit of the appellee; and it was held that it might be waived by him, and that the sureties were liable.

The appellant, having received full consideration, viz. a stay of execution until a determination of the appeal, the sureties are liable.

In Simonds *v.* Parker, 1 Met. 508, 513, it was held that a bond in replevin, with only one surety, was good at common law, and not void. Shaw, C. J., in delivering the opinion of the Court, said,

"In Morse *v.* Hodson, 5 Mass. 314, it was held that where such a bond had been voluntarily executed by the plaintiff, under which he had obtained the goods replevied, he could not avoid it, although the bond did not conform to the requisitions of the statute."

State *v.* Benton, 48 N. H. 551, was *scire facias* on a recognizance. The Court said, "The objection, that the statute requires two sureties, cannot avail to discharge from liability the single surety who voluntarily entered into the recognizance without a co-surety. If the State had refused to accept a recognizance with only one surety, the statute would have justified that refusal. But the State makes no objection; on the contrary, they seek to enforce the recognizance. The law requiring two sureties was not enacted for the benefit of respondents or sureties, but for the security of the State; and although there was an omission on the part of the State officials to insist on a compliance with the statute, this surety cannot make their misconduct, in not requiring additional security, a reason for depriving the State of the security which was given. Individuals, in many instances, are allowed to waive statute requirements enacted for their own benefit; and it seems reasonable, in a case like the present, that the State should have the same privilege. So far as the surety is concerned, the giving of the recognizance was not a compulsory but a voluntary proceeding. It is not for the surety, thus voluntarily appearing, to object to what was done."

If four persons are sued, and judgment is entered against three only, and then the four enter into a recognizance to pay the judgment against all four, they cannot quash the recognizance, on the ground that there is no such judgment.

Sanders *v.* Buck, 2 J. J. Marsh, 476.

The law also required a recognizance to be witnessed. The omission of a witness was held not to be a fatal error. The Court said, p. 479, "Whose duty is it to see that the law is complied with, in having the recognizance witnessed? It is unquestionably not the plaintiff's, who knows nothing of its execution; but it is the duty of the defendants, who, by complying with the law, are to obtain indulgence. Can they fail to have it done, and then say, Because we have failed, we will regard the recognizance as a nullity,

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This precise point was decided in The Infanta, Abbott, Adm. 329. The appellees moved for new stipulations on an appeal to the Circuit Court, on the ground that only one surety was given, and that each libellant was a non-resident of this district, and did not himself sign the stipulation.

Betts, J., held, that the objection was waived by delay, and said, "One surety is sufficient in the stipulations, where the principal is a resident within the district; and it is not indispensable to the validity of a stipulation in any case that it be executed by two sureties. It is a privilege of the party, which he may enforce or not, at his option. . . . The signatures of two sureties are not vital to the stipulation. It is a formality only, which the other party may waive."

IX. The next objection to be considered is the statute of frauds. It is suggested, in the opinion of Judge Woodruff (Record, p. 8, par. 26), that, as the instrument is not signed, and as it does not appear that the stipulator himself derived any advantage from it, it may be liable to the objection that it has no validity under the statute of frauds.

But even at common law we have seen that if the principal derives any advantage, this is sufficient consideration to the surety. And we have also seen that a stipulation need not be signed, and that a Court of admiralty has full jurisdiction, whatever be the form of the instrument; the objection, therefore, cannot prevail.

It may be safely asserted that this is the first case in which the doctrine of the statute of frauds has been supposed to be applicable in admiralty. The whole system of stipulations is opposed to such an idea.

It cannot be questioned that this instrument would be binding at common law if the sureties had subscribed it with their names. They have not done this, it is true; but they have authorized a person to write their names for them in the body of the instrument, and this is sufficient to take the case out of the statute. A deed signed by another person in the presence of the grantor, and at his

request, is the act of the grantor, and does not require an authority in writing.

Gardner *v.* Gardner, 5 Cush. 483.

It is immaterial in what part of the instrument the signature is placed, to take the case out of the statute, unless something further is to be done. Thus, if a man were to write a deed and insert his name as grantor, this would not be a signing within the statute, because something further was contemplated; but if he were to write an instrument in which his name appeared, and no further signing were contemplated, the writing his name would be a sufficient signing.

Browne on Stat. of Frauds, § 357.

In this case, as we have seen, no further signing was contemplated, as subscribing is no part of the stipulation, and the instrument was filed in court as a completed instrument.

JOHN LATHROP,
for the Petitioners.

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The points presented on pp. 16-19 of the respondent's brief are not raised by the petition and return and are not open.

See as to the point that the appeal did not supersede the stipulation, Jordan v. Agawam Woollen Co. 106 Mass. 571.

Rule 133 is within the power conferred by Adm. rule 4.

Supreme Court of the United States.

EX-PARTE.

In the Matter of Charles Sawyer et als.

PETITION FOR A MANDAMUS.

ARGUMENT AGAINST THE PETITION.

E. F. HODGES, *for Opponents.*

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TOLMAN & WHITE, PRINTERS, 221 WASHINGTON ST.
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E. F. HODGES, FOR OPPONENTS.

The Petitioners ask the Court to issue a peremptory mandamus, commanding the Court below to enter a certain judgment in this cause. Whether this is a case for a mandamus, depends upon the facts disclosed by the record, which are, so far as they relate to the remedy now resorted to, as follows:

FACTS.

1. — June 11, 1870, a decree was pronounced in the Court below in terms simply "affirming the decree of the District Court of the "United States for the District of Massachusetts."

2. — From this decree the respondents appealed on the 18th of the following October, and gave the usual appeal bond.

On the 20th of November following the decree was prepared and signed and spread upon the record.

3. — In this Court upon the hearing of the principal cause, and

in this petition now pending, the appeal was, and is, treated as if it was an appeal from the decree of November 20, and it was undoubtedly so intended by all the parties. We shall henceforward deal with the case as if only one decree was rendered, viz., the one of November 20.

4. — That decree, after pronouncing judgment in due form against the principal respondents, adds the following: "It is further "ordered, adjudged and decreed that, unless an appeal be taken "from this decree within the time prescribed by law, a summary "judgment therefor be entered in favor of said libellants' appellees, "and against James Lee, Jr., and J. Wade Davis (sureties on said "appeal, in the sum of ten thousand dollars, the amount of their "stipulation on said appeal), and that said appellees have execution "therefor, to satisfy this decree."

5. — Upon appeal to this Court, the decree was affirmed and a mandate, in the usual form, was issued, commanding the Circuit Court "that such execution and proceedings be had in said cause, as "according to right and justice and the laws of the United States "ought to be had, the said appeal notwithstanding." Thereupon a decree was made ex-parte, without notice to Lee & Davis, and without calling the attention of the Court to any stipulation, by the Circuit Court, and execution issued thereon against Oakman and als, respondents, and Lee & Davis, stipulators, February 27, 1873.

6. — The judgment and execution so issued was, upon motion of Lee, set aside as to him.

7. — The complainants thereupon applied to this Court to have said mandate recalled for the correction of an error in the record. This was done, the correction was made, and a second mandate issued in the same terms as above quoted, and in no respect touching the position of Lee & Davis.

8. — Upon the return of this last mandate, the complainants moved for judgment and execution against Lee & Davis, which, on the 8th day of May, 1874, was refused, after full hearing of the parties.

In the further examination of this case we shall treat the two decisions of the Circuit Court upon the liability of Lee & Davis as one.

* Vid Addenda post p 20

Upon the above facts, the petitioners now claim that the Circuit Court should, as a ministerial duty, have "caused an affirmance of "the above judgment to be entered," and have issued execution against Lee & Davis as stipulators, and that after the mandate there was in that Court no jurisdiction to exercise judicial authority or discretion. On the other hand, Lee & Davis assert that, while this Court affirmed the judgment against the principal respondents in the suit, it did not touch them, Lee & Davis, and as to them the mandate issued from this Court was inoperative because no judgment against them had ever been rendered appealed from or affirmed, and that said cause was, when the mandate was returned, still in the hands of the Circuit Court for determination, and the determination thereon made was right. In support of these positions in behalf of Lee & Davis we tender the following considerations: —

FIRST.

The record does not present a case relievable by writ of mandamus. The duty of the Circuit Court being, as to Lee & Davis, judicial and not ministerial.

I. The Circuit Court had never rendered any judgment against them prior to the return of the mandate, and the only judgment against them was rendered upon the return of the mandate from this Court, when for the first time the question of their relations to the cause was considered. The prior judgment against the principal respondents they could not appeal from, it adjusted matters between libellants and libellees only, and they had no right to intervene. When the libellants claimed a judgment against them as sureties or stipulators according to the rules of the admiralty, then for the first time the Court passed upon their relations to the cause, investigated the medium through which the libellants claimed to fix upon them the responsibilities of stipulators, and then pronounced that no such relations existed and no responsibilities attached.

We assert that, whether tried by the terms of the decree of Novem-

ber 20, 1870, by the rules of Court, or by the law of the admiralty, the Circuit Court rendered no judgment against Lee & Davis until the 8th of May, 1874, and that then a judgment was rendered in their favor, discharging them of liability.

1. — By the terms of the decree it appears not only that no judgment was rendered against them, but it was expressly provided that in the event of an appeal by the respondents none should be rendered.

If the terms of this judgment were not satisfactory, if the libellants then sought to have a final judgment rendered against Lee & Davis, they could have appealed and tried in this Court their right. The decree is by the admiralty practice prepared by the proctors of the prevailing party from the minutes furnished by the Court, and it may fairly be presumed to express the full scope of the judgment, and if unappealed from, to be satisfactory to the party in whose favor it is pronounced. At all events it is to be construed only by its terms as recorded. By the terms of this decree Lee & Davis are excluded from the judgment in case of an appeal, *and an appeal to this Court was taken.*

2. — By the rules of the New York Circuit no judgment is rendered against sureties at the time the final decree passes against the party. The 144th rule of the District Court for the Southern District of New York, adopted by the 136th rule of the Circuit Court for New York, provides as follows: "When proceedings on a "decree shall not be stayed by an appeal, and the decree shall not be "fulfilled or satisfied in ten days after notice to the proctor of the "party against whom it shall be rendered, it shall be of course to "enter an order that the sureties of such party cause the engagement "of their stipulation to be performed, or *show cause* in four days, "or on the first day of jurisdiction afterwards, why execution should "not issue against them, their lands, goods and chattels, according "to their stipulation, and if no cause be then shown, due service "having been made on the proctor of the party, a summary decree "shall be rendered against them on their stipulation and execution "issue." * * *

This rule clearly contemplates that after the final decree against the party has been passed and not appealed from, *then* the stipula-

tor, or party claimed to be a stipulator, receives notice, and at a hearing may show cause why judgment should not be rendered against him. Also that judgment, if rendered against him is rendered "according to the stipulation," and not upon or according to the subject matter of the principle cause. It is true the amount is fixed by the judgment in the principle cause, but the liability wholly depends upon the stipulation, and must be passed upon by the Court independently of the questions involved in the main cause. In the case of the Belle, 5 Benedict's Reports, 57 p., J. Blatchford says, referring to another rule upon a cognate subject: "Rule 71 contem-"plates that there shall be a decree on the stipulation. Such decree "is provided for in the 144th rule, under which, if the decree in the "cause is not fulfilled or satisfied in ten days after notice to the "proctor of the party against whom it is rendered, and the surety of "such party show no cause, after notice, against the performance of "the engagement as stipulators, a summary decree is to be rendered "against them on their stipulation." * * * The words "entry "of judgment, in rule 71, mean entry of judgment or decree on the "stipulation, and not entry of the main decree in the cause." It is clear from these rules and from the course of practice as presented in the above quotation from J. Blatchford, that the judgment in the main cause is not regarded as a judgment against sureties in the stipulation, but on the contrary they have a hearing, if desired, to test their liability as stipulators.

Hall's Practice, p. 113.

3. — It was and is the course of Courts of Admiralty in England, to make separate decrees, one against the principal upon the issues involved in the cause, and one at a later day after notice upon the stipulation and according to its terms.

2 *Brown, Civ. and Ad. Law*, 429.
Clarke's Praxis, Tit. 65.

4. The judgment upon the stipulation must necessarily be distinct from the judgment in the principle cause. For although the sureties in a stipulation make themselves quasi parties to the suit, and submit to the jurisdiction of the Court, yet they are not related to the

cause of action, and have no privity with the other party. The stipulation is not an agreement with the other party, but with the Court, and is always under the control of the Court. When judgment has been rendered in the cause it is *inter partes*, the sureties have no other relation to it than that they are bound through their stipulation by its terms; but it is through their stipulation and not as parties to the cause of action. Consequently, while judgment passes against the original party to the cause, by virtue of his relation to the other party, and the cause of action, it is rendered against the surety only by virtue of his engagement with the Court, expressed in the stipulation. In the one case it is a judgment resting upon the cause of action, in the other it is a judgment resting upon the stipulation.

Lane vs. *Townsend*, 1 *Ware, Rep.* 296.

We aver, then, that in the Court below, when the orginal decree was made against the respondents in the cause, no judgment was rendered against Lee & Davis, and that there is no occasion to "reject as surplusage," or to suppress or enlarge the terms in which that decree is expressed.

II. The refusal of the Court below to render judgment against Lee & Davis, was a judgment in the cause final in its terms and effect and could have been appealed from. A mandamus will not lie in a case remediable by appeal or writ of error.

Ex-parte Newman, 14 *Wall.*, 152.

III. Should it be urged that the judgment in the principal cause takes with it a judgment against the stipulators, we reply, this is true only to a limited extent. That judgment is binding upon the stipulators as to the amount, but it does not settle or relate to the fact of stipulation. After that judgment has been rendered and execution is solicited, whether without an appeal or after an appeal

Vid addenda part p 20

affirmance and mandate returned, the inferior Court then examines its judgment roll and judicially determines, 1st, whether any person appears thereon to be liable as a stipulator. 2d, upon hearing after notice whether he is in fact a stipulator, and 3d, for what sum, if any. Each of these steps demands the exercise of judicial discretion which this Court did not intend by its mandate to forbid or limit.

Lee & Davis were not parties to the appeal, and the paper by which the libellants seek to charge them as stipulators, was not before this Court, nor was its validity passed upon at the hearing. They can be in no other way subjected to the mandate than as they are found by the Court below upon judicial inquiry to be guarantors or stipulators for the payment of the judgment therein commanded to be executed.

In re Howard, 9 *Wall., R.* 175.

If, however, a mandamus is the proper remedy for such cause, we insist it must be here refused because

SECOND.

In deciding that the paper of March 4, 1870, was worthless, the Court below rendered judgment according to law.

The claim of the petitioners is founded upon the theory that that paper is an admiralty stipulation, that Lee & Davis are sureties thereon, and as such, a summary judgment should have been rendered against them.

An admiralty stipulation is an undertaking entered into by the stipulators with the Court in a cause therein pending, and upon which the Court may order summary judgment when a final decree is made. It is construed according to the intent of the Court when made, and its terms are not important so that it expresses substantially the purpose of the parties. As it may be enforced by a judgment rendered directly upon it without proceeding by an independent suit, and as it is an undertaking with the Court, it is certainly more nearly assimulated to contracts of record, recognizances,

statute merchant and statute staple, than to any other form of obligation.

It is hence not so much the terms in which the undertaking is expressed, as the proof that any undertaking ever existed which brings such instruments to the test of judicial inquiry.

In the case before us as to Lee & Davis, the contract is one of suretyship for another, and as the paper was not signed by them they are not bound unless it is shown that they entered into the obligation as stipulators in admiralty, by such proof as will justify the Court in rendering summary judgment against them according to the rules of admiralty. As an admiralty stipulation is an undertaking between the stipulators and the Court, it must be entered into in the presence of the Court actually or constructively. The proof here produced, the paper of March 4, 1870, shows that these parties made no undertaking in the actual presence of the Court: and this leaves us simply to inquire did they undertake constructively in that presence. We say the proof utterly fails to show any such undertaking.

I. This paper was not signed by either principal or surety. Every stipulation not undertaken or acknowledged in open Court, and there entered of record, must be signed by the parties in token of their submission as quasi parties to the cause. It is an indispensable part of the proofs that they acknowledge themselves in the presence of the Court.

1. This is and always has been the practice in England, all admiralty stipulations not given in open Court are signed.

Coote, p. 41 *and* 42, *Marriott, p.* 69. 310 & 314
Brown, Civ. and ad. L.
Williams & Bruce, ad. Jur. 216, 217, *and their forms of bonds, LVI and CXC.* Maryland
Abbott on Shipping, app. 497. *The* ~~Monarch~~, 2 *Hagg*, 278.

2. The American practice requires this.

a. Note the directions in Rule 59 of the Southern District of New York, vid. record, p. 8.

b. The books upon practice are specific upon this subject, both in their statement of the law and in the forms they furnish.

Benedict, § 489, 413 *and* 414; *Bett's prac.*, *p.* 26.
Conklin, *Vol II.*, *p.* 480; *Dunlap Ad. Prac.*, 473, *head note and form.*

The forms say "the undersigned."

c. The Marshal is, by rule 3, authorized to take bail by bond or stipulation. Can such a stipulation be good, if not signed.

d. In the absence of any express rule or law to the contrary, sureties in an admiralty stipulation stand as they do in any other contract, and their liability must rest primarily upon the signatures.

3. An acknowledgment made in open Court in the form of an admiralty stipulation, but not signed, is in spirit exactly a recognizance, and is binding, because it is a recognizance; that is to say, because it is an act in the cause, entered into with the Court, and in the Court, and is made a part of the record or judgment roll. In the days of the Stuarts and the Commonwealth, it was doubted whether courts of admiralty could enforce such undertakings, because they were not courts of record. In this country admiralty courts being courts of record, such doubts would not arise, and it is held that security in admiralty may be taken by way of bond, recognizance, or stipulation; but it is not, here or elsewhere held that any engagement as surety is binding unless in writing, signed by the party to be bound, save always in case of contracts of record. If, then, an unsigned stipulation entered into in open Court is held good, is it not because it is of record, and is essentially a recognizance? (*Dunlap Prac.*, 474; *Brig Alligator*, 1 *Gal.*, 145.) We believe, then, that it is sound to state the law thus: A stipulation must be signed by the party to be bound, unless it is entered into in open Court, in which case it is quasi a recognizance.

4. It may not be out of place here to observe the distinction between an admiralty stipulation and a stipulation under the Roman law. In admiralty a stipulation is an act in a pending cause, in which the obligor or stipulator becomes bound. In the Roman law

a stipulation was a ceremony prescribed for the perfection of a contract, in which the *seller* was the stipulator.

II. This paper of March 4, 1870, was not entered into before the proper officer.

If it is possible to recognize any unsigned paper as a stipulation in admiralty, it must be because it is entered into either actually or constructively in the presence of the Court. This paper was made by a man who held the position of Commissioner of the Circuit Court for the District of Massachusetts, and did not hold any commission from the Circuit Court for the Southern District of New York, where the cause was then pending.

To the Circuit Court for the Southern District of New York this person stands in no official relation whatever, and this paper is wholly without any official authentication by which the constructive presence of the Court can be inferred or assumed.

1. The English practice was formerly and until changed by the Admiralty Acts of the present reign, to appoint commissioners especially to take stipulations in each cause where they could not be taken in open Court. Now they may be taken by standing commissioners of *the Court*, but only by them. Thus the theory is there maintained that the act is done in the presence of the Court.

2. The statutes of the United States authorize the appointment of commissioners for certain purposes, and clothe them with certain powers.

Act of 1812, *c.* 25, *U. S. Stat. at Large*, *Vol.* 2, *p.* 579.
Act of 1817, *c.* 30, 3 *U. S. Stat. at Large*, 350.
Act of 1789, *c.* 20, 1 *U. S. Stat. at Large*, 88.

These statutes do not in terms qualify commissioners to take stipulations in admiralty but they do authorize them to "take acknowledgments of bail and affidavits." The rules of the Court, it is claimed by petitioners, have extended this power to cover the taking of stipulations within their Districts. That is to say: The 35th

rule of this Court says stipulations in "Admiralty and Maratime suits "may be taken in open Court or by the *proper* judge at Chambers, "or *under his order* by any commissioner of the Court who is a "standing commissioner of the Court and is now by law authorized "to take affidavits and bail, and also depositions in civil causes pend- "ing in Courts of the United States." It is under this rule only that commissioners are authorized to take admiralty stipulations.

a. The statutes above quoted do not authorize commissioners of the Circuit Court to take bail, etc., without the district for which they are appointed.

b. The above rule does not authorize *all* commissioners of the Court within the district to take stipulations; on the contrary it authorizes only such of those as are especially designated for that purpose in each case by the Court, "under his order." Thus assimilating the rule to the practice of the English Courts.

The old 5th rule indicates the same thing, viz.: That stipulations must be taken by the judge or by some standing commissioner of the Court by him specially empowered.

Hence we claim that stipulations must be executed either in open Court, before the judge in Chambers, or before a commissioner, who is not only one of the standing commissioners, but who has been especially authorized for that purpose by the Court where the cause is pending.

3. It has been suggested that the abolition of the 35th Rule and the amendment of the 5th Rule (since 1870, when this paper was made) are declaratory of the law as it existed before, and would permit stipulations to be taken before any United States Commissioner. We reply to this:

a. The amendment does not do away with the need of the special authority, it only enlarges the ranks of those who may be specially authorized. Whereas, under the unamended 5th Rule, the Court could only authorize one of *its* standing commissioners; it may, under the amended rule, specially authorize any commissioner to take the stipulation, but in both cases he must be specially authorized.

b. The amendment would not have been made, if by construction the old rules gave the same power.

4. But whether a special authority must issue for each case or not, it is plain that the stipulation must be taken before a commissioner of the Court wherein it is to be used.

a. The Rules and Statutes above referred to, and the practice in this country and England all agree upon this point. The 3d Rule of the first Circuit is a judicial construction of the powers of commissioners, which bears forcibly upon this question.

"Commissioners appointed by the Circuit Court of the United "States within and for either of the districts of the first Circuit, to "take depositions, recognizances of bail, and to do other acts by "the authority of said Court under the laws of the United States, "shall be, and by virtue of this rule, and of special orders, in each "of said districts are appointed commissioners of the Circuit Court "of the United States within and for each of the districts of said "first Circuit; provided, however, they shall act as such commis-"sioners only within the district in which they reside."

b. The Court renders summary judgment against sureties upon a proper stipulation filed. That judgment must be supported by the records of the Court, and those records must establish the relations between the sureties and the Court and the cause. The records of the Circuit Court for the Southern District of New York show no official character in Charles Demond. The paper he has returned into that Court, and upon which the petitioners demand judgment, being without the signature of the parties, is valueless, unless the Court can, from its records, discern through the hands of its officers that it was entered into constructively in its presence.

5. Testing the prayer of this petition by the principles which govern judicial action, and it seems anomalous.

The Court are asked to command the Circuit Court to render summary judgment against two men by virtue of the judgment roll or record of the cause in that Court. Inspection of the record shows —

1. No summons commanding those parties to appear before the Court.

2. No appearance.

3. No paper signed by them submitting to jurisdiction.

4. No statement of any person commissioned by the Court, that they are associated to the cause by agreement.

There is found among the files the statement named in the petition made by a person who has in that Court no official character, and who has no such record relations with the Court as to connect that paper with the judgment roll. Summary judgment is rendered against sureties in a valid stipulation, because the record shows that by an arrangement with the Court under all the guards and sanctions of a judicial proceeding they have entered into the cause. The record here does not show any such act on the part of Lee & Davis. A bald statement of a person having no official character in that Court will scarcely supply the absent ceremonials by which parties are usually brought within the jurisdiction of the Courts. This the more especially when that person keeps no record and preserves no memorandum of his official acts. The vast sums upon which the Courts of Admiralty annually pass are very inadequately protected if they rest in fleeting and evanescent documents like the one before us.

We assert then, that an admiralty stipulation must, like a recognizance, be entered into in open Court or be signed by the parties and acknowledged or entered into before a person duly commissioned by the Court. Another position equally fatal to the petitioners may be taken, viz:

III. An admiralty stipulation must either be signed by the parties to be bound, or must be entered into and acknowledged in the presence of the Court in which it is to be used, or of some one by that Court commissioned for that purpose. That is to say, if a paper purporting to be a stipulation, and signed by the parties to be bound, can be treated by the Court as a stipulation, it is because there is before the Court a contract of the parties sufficiently proven. On the other hand, if a paper not signed can be treated as a stipulation, it is only because of the official character of the person before whom

it is taken and acknowledged; and that character must be derived from the Court and appear upon its records.

The paper of March 4, 1870, was not signed nor was it entered into or acknowledged before any one having authority from the Court where the cause in which it is to be used is pending. How then can it be treated as a stipulation?

THIRD.

Judgment should not be rendered upon this paper, because it should not under the admiralty law have been exacted from the respondents in the cause.

After this cause had been appealed from the district to the Circuit Court in Massachusetts, in May, 1868, further proofs were taken, and in March, 1869, when ready for a hearing, it was removed to the Circuit Court for the Southern District of New York, where on the 16th of February, 1870, the order was made under the 133d rule, that the decree of the District Court be carried into effect unless the respondents furnish security "for payment of all damages "and costs on the appeal in this court and in the Supreme Court of "the United States, in the sum of ten thousand dollars." Thus nearly a year after the cause had been removed to the Circuit Court for New York, an order is passed under which the respondents are compelled to furnish security for the whole claim and costs as a *condition upon which they could be permitted to urge their defence.* We claim that the order is ultra vires, and any security given under it is wholly invalid and of no effect.

I. In the admiralty the court does not, in the progress of the cause, exact security for the payment of the debt. Where the person or property of the respondent has been seized upon its process, and is then in its keeping, the Court will, upon petition of the respondent, take as a substitute for such person or property, security

to itself for their return to its hands to answer the claim. But these arrangements are made only where the property or person of the respondent has been taken upon the process of the Court. In this the admiralty does not differ from Courts of common law. This is affirmed by the common maxim that the stipulation is only a substitute for person or property in the hands of the Court. In this case neither the person nor property of the respondents were taken upon the original process.

II. Under the act of 1842, ch. 188, U. S. Stat. at Large, Vol 5, p. 519, the Supreme Court made the 25th rule.

In this the Court had no purpose or power to alter the law, and it has been authoritatively asserted that it did not.

The Kentucky, 4 *Blatch. C. C. R.*, 450.

This rule seems to affirm in practice the established law of the admiralty in England, viz.: It authorizes the Court to order the respondents to give "security for costs and expenses" in suits in *personam*, and where neither person nor property has been taken upon the process.

In making this rule the Court have acted upon the whole subject of ordering the security to be given in such cases, and the Circuit Court had no power by another rule to qualify or enlarge its scope. The rule of the Supreme Court limited the discretion of the Circuit Court to ordering or refusing to order the respondents to furnish bail for costs and expenses, and did not leave them by rule or otherwise to expand their powers over the respondents. The 46th admiralty rule authorizes the District and Circuit Courts "to "regulate the practice of said Courts respectively, in such manner as "they shall deem most expedient for the due administration of jus-"tice in suits in admiralty in all cases not provided for by the fore-"going rules." This rule implies, if it does not express, that in cases where the admiralty rules have provided a course of proceeding, that the Circuit and District Courts cannot deal with the subject. If then the 133d rule is construed to mean that the Court may order the respondent to furnish security to pay the claim, it is unlawful, because it changes the 25th rule of the Supreme Court, and

because it changes the admiralty law which no Court has the power to do.

III. In exacting security for the claim upon an appeal to the Supreme Court, the Court act under the Statute and not under a rule. (Act, September, 1789, 1 Vol. United Stat. at Large, chap. 20, Sec. 23 and 24, page 73; Act, March, 1803, 2 Vol. United Stat. at Large, chap. 40, page 244.)

The 133d rule derives no support from the practice under the above statutes of taking security for the claim upon appeal.

It is to be remembered that this is not a bond upon appeal in any sense. In terms and in fact, it is a security ordered while the appeal was pending, long after it had been entered, and as a condition for making defence in that Court.

If the 133d rule can be supported, it is in the power of the Circuit Court of any circuit to make a rule that makes it impossible for a defendant to assert a good defence, because it is impossible for him to secure all the plaintiff demands. The more exorbitant and unjust the plaintiff makes his demand, the greater obstacles to the defence.

IV. It is possible this 133d rule may be supported by limiting its terms to those of the 25th rule of this Court, and construing the word *damages* as meaning simply the damages occasioned by delay, instead of the whole claim. For the purposes of this hearing this possibility is unimportant, for the question demands judicial inquiry, discretion and judgment from the Court below, and this Court will not, under such conditions, control by mandamus that tribunal.

FOURTH.

The bond given by the respondents upon the appeal to this Court, supersedes and cancels this.

I. In admiralty a stipulation is a substitute for the person or property seized on the service of the process. It is taken by the Court for a sum only sufficient to cover the claim and interest and cost, and if in rem never for more than the value of the property. Also, property or person once liberated on a stipulation, cannot be again seized on the same claim in any stage of the proceedings.

2 *Wms. & Bruce Ad. Juris.* 210.
Carlisle, 6 *W. Rep.* 197.
Seringapatam, 3 *W. Rob.* 41.
Kalamazoo, 1 *Jurist*, 386.

The only exception to this last rule is in proceedings in rem where the stipulators have become insolvent and the property remains in the hands of the respondent, when a second seizure and new stipulations may be ordered.

II. In applying these general rules to practice it has been held in admiralty —

1. That the surrender of the principal relieved the bail after they had been sued in scirefacias.

Law vs. *Townsend*, *Sup.*

2. That the party appellant is required to give fresh security to prosecute the appeal and pay the costs; for the sureties in the Court from whose decree the appeal is made are not bound in the cause of appeal.

Dunlap, 322, 2 *Brown Civ. and ad. Law*, 437, 410.
Clarke's Praxis, *Tit.* 59, 5 *ed.*, *n.*

III. To make this a bond to secure the payment of the debt, would be to place in the hands of the Court two securities for the same thing — and why may not both be collected if both are good? Suppose the sureties in both stipulations had been the same persons (and no rule or principle forbids this), would not the latter, being co-extensive with the first in its obligation, supersede the former upon every principle? Otherwise it is superfluous.

ADDENDA.

If the petitioners urge that the appeal from the circuit court was taken from the decree of June 11, and not from the decree of November 20, we reply—

1. The record of the principal case in this court, December Term, 1871, shows that the appeal was then treated as an appeal from the decree of November 20. Indeed, the case was then treated as if only one decree had been made.

2. The decree of June 11, makes no mention of the sureties; and if the mandate refers to that decree only, then it does not make any direction to the circuit court to deal with the stipulators, and leaves their liability to be passed upon as an unsettled question in that court.

3. The decree of November 20, in this view, stands unappealed from; when, then, the libellants applied to the circuit court for an execution upon that decree, it was the right of the stipulators to have notice and day in court before any execution should issue. 144th Rule.

It was also in the power of the court to correct that decree at any time before it was executed. The admiralty prefers proceedings by motion to the more complicated process of suplemental or cross libel, and allows correction of decrees, if reasonably brought to the attention of the court.

The Monarch, 1 W. Rob., 21.
Benedict's Ad. Prac., Sec. 548.
The Vrow Hermina, 1 Rob., 163.